CITIZENS AND CONSTITUTIONS

CANADA WEST FOUNDATION

THE CANADA WEST FOUNDATION

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CITIZENS AND CONSTITUTIONS

A Constituent Assembly as a Means to Citizen Participation in Constitutional Change

A Report Prepared for the
Canada West Foundation

by

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FOREWORD

Time and again during the Canadian constitutional debate, the arguments for and against the establishment of a constituent assembly have been raised. Too often this idea has been hurriedly dismissed, due in part to a lack of understanding regarding the fundamemtal issues underlying the adoption of this mechanism for constitutional renewal.

The purpose of this publication is to provide Canadians with a concise statement which identifies the advantages and disadvantages of a constituent assembly. It also places the concept in a historical and comparative perspective. The authors then proceed to recommend a workable model for Canada. Even if the reader does not agree with the authors' conclusions and recommendations, this report provides an excellent overview of the issues involved and relates them to the Canadian constitutional debate and processes.

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TABLE OF CONTENTS

I. Introduction 5
II. Advantages of a Constituent Assembly 9
III. Disadvantages of a Constituent Assembly 17
IV. Comparative Guideposts 25
A. United States 25
B. Australia 27
C. West Germany 28
V. Canadian Guideposts 31
A. The Harney Proposal 31
B. Breton and Scott's Design of Federations 31
C. Positive Action Committee 32
D. The Bercuson Proposal 33
E. The Progressive Conservative Proposal 34
VI. A Workable Alternative 35
A. Initiation 35
B. Basis of Representation 36
C. Selection Procedure 37
D. Assembly Format 38
E. Agenda 39
F. Ratification 40
VII. Conclusions 43

I. INTRODUCTION

The current Canadian constitutional debate is at one and the same time a great opportunity and a serious danger. The opportunity is for a new commitment and a fresh start in the form of a revised constitution to meet the needs of Canadians in the 1980's and beyond. The danger is that this opportunity will be lost, or purchased at too high a price in internal dissension and lasting bitterness. In politics as in economics, there is a strong relationship between the actual risks and the potential gains, but it is important to ensure that we are getting the maximum potential gain for the minimum necessary risks.

In October, 1980, elements of a new constitution were proposed in the form of a parliamentary resolution. This was presented as a unilateral initiative on the part of the national government for which provincial agreement was neither sought nor considered necessary, and the reason given for this action was frustration with the inability of the first ministers conference format to generate meaningful constitutional change. While public opinion polls at the time indicated that the **substance** of this resolution enjoyed a broad base of public support, opposition extended from a significant minority of the public through to the official opposition as well as a majority of the provincial governments. Opposition to the **method** of constitutional change contained within the resolution was much more widespread, being shared by a majority of Canadians.

To install a new constitution that is perceived as reflecting the vision of only one leader, or a small minority of governments, or a few of the partisan groupings that engage the political commitment of Canadians, is to create a frail and contentious foundation for the future. It is to risk too much for all too little gain. Conversely, the insistence on total unanimity among all eleven governments is biased toward rigidity; it risks little and consequently gains little or nothing. Are Canadians obliged to choose between a further prolongation of what has been called "fifty-four years of frustration", and a procedure for the renewal of the Canadian federation that violates the spirit and indeed the very principles of Canadian federalism? Is there no alternative to, on the one hand, remaining a colony forever, and on the other hand, pursuing a course of action that flatly ignores the firm convictions of most of the political leaders that Canadians have elected to guide their

destinies? Is there no middle ground between a narrowly-based unilateral action and a broadly-based stalemate?

As this report goes to print, the federal government's constitutional resolution of 1980 is well through the process of enactment. It has cleared the hurdles of parliamentary debate and public committee hearings, and has been submitted to the Supreme Court of Canada before all or part of it is forwarded to the Parliament of Great Britain for formal enactment into law. The constitutional resolution deals with some important and long-standing issues such as the question of an amending formula and the problem of language and educational rights. It also deals with the question of an entrenched charter of rights, although that has not been on the federal-provincial constitutional agenda for very many years and even now is not unanimously conceded a high priority.

The constitutional debate that has been carried on in this country for the last ten years or so has covered a much wider range of issues and problems than are contained in the 1980 resolution. Numerous proposals for change (eg. Canada West Foundation ALTERNATIVES paper, Canadian Bar Association's research study TOWARDS A NEW CANADA, various provincial government publications, and the Pepin-Robarts REPORT ON CANADIAN UNITY) have been put forward and all identify as a key element the need for structural change within the national government. This question was on the table in the federal-provincial constitutional conference of 1980, but despite considerable agreement does not appear in the federal government's resolution. Changes or clarifications in the distribution of powers between the two levels of government has also been suggested as a necessary component of constitutional renewal, but that matter is also ignored by the resolution except to the extent that it would be affected by an entrenched charter of rights.

Whatever the fate of the constitutional resolution at the hands of the Supreme Court of Canada, the work of constitutional renewal will have to go on. Many of the key issues have yet to be resolved. If the Court accepts the arguments of the dissident provinces, then we are back where we were one year ago, save for the accumulated bitterness and frustration. If the Court finds for the federal government, then we still have the key issues of structural change and the distribution of powers to address, issues that will not necessarily be easier to resolve should the current resolution on the constitution become a fait accompli. If the Court does a cut-and-paste job on the resolution, then we may be obliged to consider again some of the matters addressed within it. Whichever of these comes to pass, the current parliamentary resolution will be only one chapter, and by no means the last chapter, in the story of Canadian constitutional change.

To paraphrase Winston Churchill's classic remark, this is not the end, nor even the beginning of the end; it is at best the end of the beginning of the process of constitutional renewal. To carry us through to the end, to create a Constitution fit for a mature political community, will require new initiatives and bold innovations.

This paper seeks to identify a third alternative, a middle ground. It is proposed here that a new Canadian constitution be drafted by the Canadian people acting through a constituent assembly, the main features of which include a body of people chosen directly and exclusively for the purpose of drafting a set of proposals for constitutional change. The details regarding the creation and the functioning of such a body we shall suggest at the end of this paper. First, however, we feel it important to examine the *advantages* and the *disadvantages* of the device, and to point out possible lessons from historical examples drawn from the experiences of other countries. We shall also review some contemporary Canadian proposals that point in the same direction.

II. ADVANTAGES OF A CONSTITUENT ASSEMBLY

The device of a constituent assembly — a body of people chosen directly and exclusively for the purpose of drafting a set of proposals for constitutional change — offers several important advantages for the effective accomplishment of constitutional renewal. A constituent assembly would:

1. *CREATE A CANADIAN CONSTITUTION, MADE IN CANADA BY CANADIANS FOR CANADIANS*
2. *PROVIDE A BROADLY-BASED VEHICLE FOR CONSTITUTIONAL CHANGE*
3. *PROVIDE AN OPPORTUNITY FOR EXTENSIVE CITIZEN INVOLVEMENT IN THE PROCESS OF CONSTITUTIONAL RENEWAL*
4. *BOTH REFLECT AND HELP TO CREATE A DEEP POPULAR COMMITMENT TO THE PRINCIPLES AND THE DETAILS OF A NEW CONSTITUTIONAL ORDER*
5. *PROVIDE A BODY WITH A CLEAR MANDATE FOR THE CONTEMPLATION OF CONSTITUTIONAL REFORM*
6. *PROVIDE A DELIBERATIVE BODY THAT WOULD WORK FULL TIME ON CONSTITUTIONAL REFORM*
7. *RESPOND TO THE PRIORITIES OF CITIZENS, NOT ONLY OF GOVERNMENTS, IN THE FORMULATION OF CONSTITUTIONAL PROPOSALS*
8. *REDUCE THE IMPACT OF PARTISANSHIP ON THE CONSTITUTIONAL PROCESS*
9. *ADDRESS A BROADER CONSTITUTIONAL AGENDA THAN THAT CONTEMPLATED BY THE CANADIAN PARLIAMENT*
10. *ENCOURAGE FRESH CONSTITUTIONAL PERSPECTIVES*

1. A Constituent Assembly Would Create A Canadian Constitution, Made In Canada By Canadians For Canadians

The present controversy over the unilateral action of the national government has created a situation in which both the federal government and the dissident provinces can be reasonably presented as attempting to exploit the remnants of the colonial link to accomplish their own immediate purposes. The federal government is trying to use the British Parliament to accomplish what possibly cannot be legally achieved in Canada; and the dissident provinces are therefore forced to use the British Parliament in trying to block domestic initiatives that they find politically objectionable. Both efforts can be reduced to the same undesirable slogan: "Let's be a colony, one more time." Both remove, in the most obvious and blatant way, Canadian problems to the parliamentary deliberation of another country.

A constituent assembly would create a body to take the constitutional initiative, a body that was chosen by Canadians, made up of Canadians, meeting in Canada, and listening to Canadians. A constitution is too important and too significant a document to leave in the hands of another country, even one whose links to this country run as deep as those of Great Britain. Constitutional renewal is too important for the people to remain mere spectators.

2. A Constituent Assembly Would Provide A Broadly-Based Vehicle For Constitutional Change

The present national government suffers a serious handicap for the purposes of recommending constitutional change. It draws its support overwhelmingly from the central part of the country, and is without significant elected representation from the West and the North. The solid opposition of the governments of the four Western provinces and the two Northern territories further highlights this handicap, and gives national government initiatives of whatever content the appearance of a solution imposed by part of the country on the rest of the country. A constituent assembly would provide a regionally balanced yet national body that would more accurately reflect the diversity of Canada, and whose members would not be functionally divided between government and opposition or bound by rigid party discipline.

Canadians are diverse in regional terms; they are also diverse in partisan terms. Even constitutional conferences of the eleven first ministers still exclude national and provincial opposition parties which among them claim the political allegiance of more Canadians than do

the eleven parties holding national or provincial office. A constituent assembly would provide for all these points of view to be represented in proportion to the support they could rally from the Canadian electorate.

3. A Constituent Assembly Would Provide The Opportunity For Extensive Citizen Involvement In The Process Of Constitutional Renewal

In the past, federal-provincial conferences did not have a high public profile, and citizens appeared to be by and large indifferent to the process of constitutional reform. These days have passed. The prolonged and increasingly contentious constitutional debate has heightened public interest in both the constitution and the process for its reform. The protracted public hearings on the constitution have whetted an appetite for participation that may have changed forever the context of constitutional change in this country. Citizens in constitutional meetings and forums across the country have been searching for some means for informed and practical participation, and this interest provides a valuable resource that must be tapped. A new constitutional order imposed by governments alone will sit less easily with Canadians today than it might have done in the past.

A constituent assembly provides a practical focus for citizen involvement. Concerned citizens could participate directly in the process of constitutional change as candidates for the constituent assembly, in supporting candidates of their choice, in public hearings, and in the ratification process. Rather than confrontation between governments, an open and dynamic process responsive to public concerns is the appropriate mechanism for constitutional change, and one that could be well served by the device of a constituent assembly.

4. A Constituent Assembly Would Both Reflect and Help To Create A Deep Popular Commitment To The Principles And The Details Of A New Constitutional Order

It is one of the major flaws of the British North America Act of 1867 that while its reasoned political compromise created a federal structure that has survived for over a century, it was never an effective focus of national loyalties or a symbol around which a national identity could be built. In this it contrasts sharply with the American constitution of 1787, and one factor in this difference is the means whereby the

two documents were drafted and brought into effect. A constituent assembly would draw upon popular enthusiasm and commitment through the openness of its process and its responsiveness to public suggestions, and help to create commitment through the ratification process, helping in both senses to generate the national will that alone can sanctify a constitutional document.

A further and related advantage of the constituent assembly is that it would present the constitution as something above and beyond governments, a direct emanation of the national will to which governments as well as citizens are equally subject. This contrasts sharply with the serious flaw of the present methods of constitutional change which would present the Canadian people with a constitution that was the gracious gift of one or more governments. A popular and open procedure such as a constituent assembly would be a fittingly democratic prelude to our new century, and an affirmation of the political maturity of the Canadian people.

5. A Constituent Assembly Would Provide A Body With A Clear Mandate For The Contemplation Of Constitutional Reform

It has been pointed out that the present national government's mandate from the Canadian people emerged from a political campaign which did not feature, and indeed hardly included at all, the question of constitutional change and certainly did not address the issue of unilateral action. The extent to which the 1980 election victory authorizes such major constitutional innovation is therefore very much in doubt. Similarly, it is open to question whether provincial electorates contemplate the various contenders for provincial office as plenipotentiary constitutional negotiators, or whether they cast their vote on the basis of more immediate considerations. The clearest example in this case is the province of Quebec, where the voters in a public referendum rejected by a decisive margin the option of sovereignty association, but went on to re-elect with a majority government the party that supported that alternative.

A constituent assembly would be free of these confusing legacies and ambiguities. Its members would be selected for one task, the consideration of constitutional reform. They would have a clear mandate to consider, debate and recommend alternative constitutional arrangements. The clarity of the context within which these members were chosen, the unambiguous nature of the purpose for which they were selected, will simplify and clarify the process of constitutional change.

6. A Constituent Assembly Would Provide A Deliberative Body That Would Work Full Time On Constitutional Reform

The existing forums and procedures for constitutional deliberation operate under a considerable handicap because leading governmental representatives can meet only sporadically. Governments are of necessity involved continuously in other issues and responsibilities that impair the resolution of constitutional issues. Linked bargaining, where the resolution of one dispute is dependent upon the prior resolution of one or more unrelated disputes, is notoriously difficult and cumbersome; yet it is forced upon the present process by the simple fact that the same people are responsible for both the day-to-day business of government and the consideration of proposals for constitutional change. The ongoing controversies over natural resources provide several examples of issues that block substantive agreement on constitutional change, or poison the political atmosphere so as to preclude even an open exchange of views. Further, with eleven governments actively involved in the process, there is the constant possibility that one or more potential or actual electoral campaigns may intrude upon and adversely affect the process. Such campaigns exacerbate the stridency of constitutional positions and limit the capacity for constructive compromise.

In a constituent assembly, constitutional issues would be highlighted, and the spill-over from other disputes would be minimized. Constitutional discussions cannot and should not take place in complete detachment from other political issues; however, these questions should inform, and not block, the constitutional debate.

7. A Constituent Assembly Would Respond To The Priorities Of Citizens, Not Only Of Governments, In The Formulation Of Constitutional Proposals

There are several respects in which the priorities of citizens and of governments may diverge, and in which the juxtaposition of the two would be beneficial to the process of constitutional change. First, governments have self-interests to protect that need not coincide, and may even conflict, with the interests of their own electorate. A government will wish to protect its own programs, ensure its own re-election, and maximize its power, concerns that may not be shared to the same degree or at all by its electorate. Governments may oppose constitutional reforms that would serve the long-term interests of their electorates. For example, opposition to the direct popular election of Senators which

would increase the power of provincial *populations* in Ottawa may be opposed by members of provincial and federal cabinets because the existence of a strong and functional upper house could reduce the powers of the cabinet and decrease the ability of Premiers to influence national policy as exists at present.

Secondly, constitutions provide a means to limit the powers of governments. If participation in the process of constitutional renewal is restricted to governments, the resulting document may be more concerned with the rights of governments than with those of citizens.

By removing the constitutional process from the exclusive control of governments, the constituent assembly offers the prospect of constitutional initiatives that reflect both citizen and governmental priorities.

8. A Constituent Assembly Would Reduce The Impact Of Partisanship On The Constitutional Process

It is obviously impossible to describe briefly the impact of partisanship upon federal-provincial constitutional conferences; it is probably neither totally absent nor completely pre-emptive. Certainly the present unilateral initiative of the federal government has become inextricably entangled with partisan considerations. By removing constitution-making from the combative partisan context of the House of Commons, where party discipline and electoral interests prevent serious negotiation and compromise, a more balanced constitutional package can be anticipated.

A constituent assembly would reduce the impact of partisanship even though its complete purge from the constitutional process is neither possible nor desirable. A realistic goal is a constitutional forum where party lines and party discipline lack the rigidity they possess on the floor and in the committees of the House of Commons, and where party lines could be crossed without fear of reprisals or the fall of a government. While partisanship would still colour the perceptions of many delegates, the structure and organization of the assembly would not follow party lines. In its operation, although not in its selection, the constituent assembly would partially transcend partisanship. This is appropriate; although political parties are an invaluable part of the management of political affairs, their imperatives should not pre-empt the resolution of constitutional questions.

9. A Constituent Assembly Would Address A Broader Constitutional Agenda Than That Contemplated By The Canadian Parliament

The present procedures, in either the unilateral or the unanimous

consent forms, operate on the basis of an agenda that is limited either by the personal preferences of specific individual actors, or by the perception of possible gains and benefits to one or more governments. Such a skewed agenda reflects the concerns and priorities of the governments, but not necessarily those of the Canadian people. Because of its partial freedom from partisan preoccupations, and its relative separation from immediate policy or electoral concerns of any one government, a constituent assembly would be able to consider a broader range of constitutional issues. The extent to which any number of participants was preoccupied with their own post-assembly status and powers would be sharply reduced. Matters such as the reform of central government institutions (Senate, federal regulatory agencies, Supreme Court, the electoral process) that have currently been put to one side could be seriously considered. A constituent assembly offers the best opportunity for a balanced and open consideration of such questions.

10. A Constituent Assembly Would Encourage Fresh Constitutional Perspectives

The extended constitutional discussions of the past decade, in which many of the key players have been present throughout, have cramped our constitutional horizons and prematurely narrowed the debate. The process of constitutional renewal faces the danger of degenerating into an arcane ritual, where major participants march in the same well-trodden circles and chant the same lines.

A constituent assembly would provide an opportunity and a vehicle for fresh ideas, new and varied participants, and a broader constitutional vision. There is room in the constitutional debate for more than a series of minor variations upon the British North America Act. An upper chamber based on representation schemes quite different from provincial boundaries, more or fewer provinces, special status of one or more kinds, all these are ideas that have been raised and deserve a hearing on their merits within a body that has the time, the openness, and the imagination to explore them. On an even more practical and immediate level, the constituent assembly could provide a more effective vehicle for the expression of the constitutional interests and perspectives of aboriginal Canadians, northerners, and rural populations as well as urban communities.

III. DISADVANTAGES OF A CONSTITUENT ASSEMBLY

The use of a constituent assembly as a means for constitutional renewal presents several possible risks or disadvantages. A constituent assembly would:

1. *BE A RADICAL DEPARTURE FROM CANADIAN POLITICAL TRADITIONS AND PRACTICES*
2. *BE UNACCEPTABLE TO THE ELEVEN FIRST MINISTERS*
3. *LACK FIRM AUTHORITY TO CONVENE AND PROCEED WITH SWEEPING RECOMMENDATIONS*
4. *POSSIBLY REPRODUCE IN A NEW FORUM THE EXISTING CONSTITUTIONAL DISAGREEMENTS AND STALEMATES*
5. *BE COMPOSED OF MEMBERS WHO WOULD BE POLITICALLY UNACCOUNTABLE*
6. *BE AN INAPPROPRIATE MEANS FOR DEALING WITH THE EXTREME COMPLEXITY OF A MODERN POLITICAL SYSTEM, ESPECIALLY A FEDERAL SYSTEM*
7. *POSSIBLY THREATEN THE FRAGILE BALANCES AND COMPROMISES THAT HOLD THE CANADIAN POLITICAL SYSTEM TOGETHER*
8. *BE BIASED IN FAVOR OF ONE VIEW OF FEDERALISM OR OF CANADA, NAMELY THE NATIONALLY ORIENTED VIEW*
9. *REQUIRE FOR ITS PROPOSALS A RATIFICATION PROCEDURE THAT OF NECESSITY WOULD BECOME AS CONTENTIOUS AS THE SUBSTANTIVE MATTERS IN QUESTION*
10. *CREATE THE DANGER THAT ITS FAILURE WOULD COLLAPSE ANY HOPE FOR EFFECTIVE CONSTITUTIONAL CHANGE*

1. A Constituent Assembly Would Be A Radical Departure From Canadian Political Traditions and Practices

Both the national government and all the provincial governments of Canada operate within the traditions of parliamentary democracy and responsible government. This tradition places great stress upon a strong political executive, supported by a majority in the legislature, and accountable to the people in periodic general elections. Because the government will be called upon to account for its actions during an election, it is entitled to broad and sweeping powers in the interim. The primary formal provision for popular pressure upon the political executive is through the potential sanction of denying the government re-election. Attempts to supplement this form of accountability with more direct democratic devices has been firmly resisted. Only in the Prairie provinces, under the impetus of the Progressive movement after World War I, was there serious (if brief) experimentation with provisions for the recall of elected representatives or popular initiatives. With this exception, the tendency has been towards strong executives with a monopoly upon policy initiatives, accountable only through the legislature and general elections. Recourse to non-binding referenda at the convenience of the government is not a major departure from this trend. To move outside such channels by creating a constituent assembly would represent a radical change. Of course, to those who argue that these traditions have failed to generate a satisfactory process of constitutional reform, or even to provide for satisfactory regional representation in the institutions of the national government, such a departure may not seem a serious disadvantage.

2. A Constituent Assembly Would Be Unacceptable To The Eleven First Ministers

The Prime Minister and the ten provincial first ministers have repeatedly argued that the revision of the constitution is part of their responsibility. To date, their participation in constitutional deliberations has often been informed by the question of how contemplated revisions would affect their government or their specific political interests. This is neither surprising nor suspect; first ministers have been selected to head governments and to carry out the jurisdictional responsibilities of their office in the best interests of their electorate, not to relinquish their responsibilities to another group of citizens.

Given this orientation, recommendations incorporating a drastically revised federalism, with possible changes in the role and importance of some or all first ministers, are likely to receive less than enthusiastic

support. The creation of a constituent assembly is much more likely to appeal to those who are now only spectators to the process of constitutional change, and who might become participants if a constituent assembly were formed. Understandably, a first ministers conference would be reluctant to sanction the creation of a constituent assembly, for the simple reason that they would lose all control over its deliberations. At most, they would wish to channel the recommendations of such an assembly back through the first ministers, who could again forestall sweeping revisions. Clearly, the first hurdle to be cleared by a constituent assembly is the very practical one of overcoming this resistance.

3. A Constituent Assembly Would Lack Firm Authority To Convene And To Proceed With Sweeping Recommendations

Because of the lack of Canadian precedents, and possible reluctance from the first ministers, a constituent assembly might lack a firm foundation for its deliberations and suggestions. Formally, because political sovereignty here does not lie with the people as it does in the United States, the Canadian people have no right to determine on their own initiative the rules by which their political lives are to be governed. There is neither the tradition nor popular experience with direct democratic bodies which bypass the formal legislative processes and structures. The political and legal ambiguity of a constituent assembly, its novelty and its impermanence, could well preclude a serious reception of its proposals, and thereby forestall a satisfactory resolution of constitutional issues. The problem, of course, is not insoluble. Because sovereignty is divided between the parliament of Canada and the ten provincial legislatures, they can delegate to any group they choose the responsibility for drawing up a set of proposed constitutional revisions. Whether they would be willing to give such a body the mandate it needs to be successful, or whether that body could generate the popular enthusiasm that would force governments to consider its ideas seriously, are other questions.

4. A Constituent Assembly Would Possibly Reproduce In A New Forum The Existing Constitutional Disagreements And Stalemates

There is the very real problem that we might wind up putting old

wine into a new bottle, reproducing in the new arena of the constituent assembly the same diverse views and fundamental disagreements that already dominate the constitutional debate. If we allow governments or the executive-dominated legislatures to select the delegates for such an assembly, those delegates are most likely to be chosen as spokesmen for existing views and this seems a sure route to repeating the existing deadlock. Even if delegates are directly elected, the likelihood is that favored candidates would be precisely those political leaders who now take part in the constitutional debate. As the divergent constitutional points of view of the various governments do reflect the preferences and loyalties of many citizens, the possibility of repeating the existing deadlock is a very real one. It is not, however, inevitable. To say that voters might opt for established political leaders to represent them in a constituent assembly is not to preclude the chance that they might also choose other or additional spokesmen. The very fact of a single electorate choosing in a single election between the competing visions of Canada that have emerged from recent conferences might itself go a long way toward resolving the question of who speaks for Canada. Provincial electorates which straddle the fence by electing politicians with quite different constitutional perspectives in national and provincial elections would be given the opportunity to indicate the balance in their commitments to those views.

5. A Constituent Assembly Would Be Composed Of Members Who Would Be Politically Unaccountable

The constituent assembly would be a "one time only" procedure. Its members would meet at a designated time for a designated period, prepare (or fail to prepare) a set of constitutional proposals, and then dissolve, never to meet again as a collective body. Depending on the degree of confidentiality that surrounded all or part of the proceedings, it might never be possible to find out who did what, who said what, who suggested (or failed to suggest) what, whose votes eliminated what ideas from further consideration. Certainly it would be most difficult to assign credit or blame. Even if such credit or blame could be established, it would have no direct electoral consequences since the constituent assembly is not contemplated as an ongoing body. The normal sanction we hold over any elected representative is the sanction of re-election, the member's awareness that his position is dependent upon satisfying his electors. In the case of the constituent assembly, this and indeed any sanction would be lacking. The very condition of operating in a political vacuum that gives the assembly the chance of accomplishing something

could undermine its effectiveness. To be sure, the point should not be overstressed. To say the members of such an assembly could shirk their duties is not to say that they would do so, and there is no reason to expect that they would not take their responsibilities very seriously indeed. However, the political limbo into which members of the assembly would be thrust is a practical consideration that must be recognized.

6. A Constituent Assembly Would Be An Inappropriate Means For Dealing With The Extreme Complexity Of A Modern Political System, Especially A Federal System

Modern democratic political systems, and particularly federal systems, are extremely complex. Both the federal and provincial governments in Canada are large bureaucratic organizations employing hundreds of thousands of Canadians, exercising their authority over virtually the entire range of human activity, and operating thousands of intricate and complicated programs. The fiscal, programmatic and bureaucratic relationships between federal and provincial departments and agencies, or between those of different provinces, or even between departments and agencies within a single government, form a bewildering maze for even the most well-informed. Given this complexity, it may be argued that it is ill-advised to unleash a constituent assembly with a broad mandate for constitutional change. If the constituent assembly is comprised largely of non-governmental personnel, an assumption that is implicit in most recommendations, the danger is compounded. The constitutional revisions of such a group could create fiscal, programmatic and bureaucratic chaos that would take years to unravel and would disrupt the provision of public services in the interim. The process of constitutional *renewal* is quite different from that of initial constitutional *creation;* the latter has no ongoing complex operations to accommodate, and can write upon a virtual blank slate. Expert advice, adequate research staff, and phase-in time for major revisions would all reduce the scope of the problem.

7. A Constituent Assembly Would Possibly Threaten The Fragile Balances And Compromises That Hold The Canadian Political System Together

A basic rationale for a constituent assembly is the greater degree of citizen involvement and participation that it would encourage, the goal being a constitution designed by citizens rather than one imposed

by governments. However, broad-based citizen activism may be insufficiently sensitive to the special fears or needs of minority groups, and inadequately attuned to the compromises and concessions that have been made in the past to accommodate the diverse demands placed upon government. For example, Francophone Canadians, both in and out of Quebec, have a long-standing suspicion of Anglophone actions and intentions. In the past, Francophone interests have been accommodated within a relationship evolved and sustained by political elites of both linguistic groups that might not have survived popular ratification.

The problem with greater public participation lies with its inherent democratic pressure for *equal* participation and its implicit majoritarian implications. Carried to its logical end, this suggests a drafting procedure and even a ratification procedure that might preclude adequate protection for minority ethnic and regional interests. In the light of recent political events, the concerns of Francophone, Western and Northern Canadians emerge as requiring special and careful handling. The danger here may easily be exaggerated. We may be overstating the insensitivity to minority interests of the citizens elected to such a body. It may also be that the delicate balances of federalism would receive wider popular support and understanding than has been assumed. Nonetheless, the spectre of a constitutional process that would overlook the particular concerns of a particular region merely because its numbers are small can be a disturbing image.

8. A Constituent Assembly Would Be Biased In Favor Of One View Of Federalism Or Of Canada, Namely The Nationally Oriented View

The selection of delegates to a constituent assembly would focus on national issues and a national scale; the mandate of such delegates and the environment within which they would operate would both tend to generate a common sense of nationalism and a spirit of national community. The risk is that such a surge of nation-building sentiment could threaten the balance of loyalties within every citizen that is generated by the very fact of being at one and the same time a citizen of Canada, and the inhabitant of a province or territory. There has been a tendency recently in some national constitutional forums to disparage provincialist visions of Canada as un-Canadian. Yet these views represent a part of the Canadian heritage and reality that is every bit as legitimate as identification with the national flag and capital. Surveys over many years have shown that most Canadians feel closer to their provincial government than to the federal, trust it more, have more confidence in its responsiveness to their needs and concerns. A wave of popular enthu-

siasm focussed strongly on the national community might give us a constitution that Canadians with a more province-centered vision of the country would find difficult to live with once the euphoria had worn off. The danger need not be overstated, as it is impossible to state in advance what the dynamics of such a body would be, but the danger nevertheless exists of unconsciously "loading" the argument or the means of its resolution in favor of the nationally orientated viewpoint.

9. A Constituent Assembly Would Require For Its Proposals A Ratification Procedure That Of Necessity Would Become As Contentious As The Substantive Matters In Question

The constituent assembly would exist, not as a legislative body, but as a deliberative body charged with producing a set of proposals for constitutional change. These proposals would then be subject to wider ratification before they would come into effect as the new Canadian constitution. The problem is deciding upon, or deciding who decides upon, the rules of ratification. Would the ratification procedures be decided by the first ministers prior to the creation of the assembly? Would the assembly itself propose rules concerning the ratification of its own proposals? Would ratification be by governments? Would unanimity be required, or an unusual majority, or specified regional majorities? Or would we use referenda, obviously over the objections of those provincial governments who have already found the idea unacceptable? Would a national majority be enough? Or an unusual majority? Or a majority of Canadians in a majority of provinces? Obviously the campaign for ratification itself poses perils and dangers. Far from being a triumphal affirmation of the Canadian collective political will, it could be bitter and divisive, as any group that felt it might lose power or advantage under the proposed changes would have one last chance to defend the status quo. The process whereby the hard facts of today clash with the hopes of tomorrow could seriously aggravate the political divisions within the country. Yet, as the 1980 Quebec referendum showed, the divisive effects of such a campaign need not be permanent, and should not be overemphasized.

10. A Constituent Assembly Would Create The Danger That Its Failure Would Collapse Any Hope For Effective Constitutional Change

The positive scenario for a constitutional assembly is most encour-

aging: widespread public interest in selecting a constituent assembly, which then drafts a set of constitutional proposals that are enthusiastically endorsed by the public in a referendum. The negative scenario is extremely discouraging. The possibility cannot be discounted that the assembly would fail to agree upon a constitutional proposal, or that a majority proposal would be brought forth over the strenuous objections of a substantial regional, ethnic or ideological minority. If a proposal does emerge, there remains the possibility of defeat following a bitter and divisive ratification campaign. In failing the assembly could collapse any hope for constitutional reform or renewal and discredit in advance any more modest efforts in that direction, obliging dissident regional and ethnic minorities to seek more drastic solutions. As was pointed out at the beginning of this report, there are no significant gains without some risk. However, our desire for a solution to the constitutional problems of the present should not blind us to the possible costs of any proposed solution.

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The above discussion does not exhaust the problems that might be associated with a constituent assembly; others arise from technicalities of design and can best be discussed in the context of a specific proposal. However, before turning to that proposal it is useful to look briefly at the way in which a number of other federal states have established their constitutions in order to determine what comparative guideposts might exist.

IV. COMPARATIVE GUIDEPOSTS

The following discussion examines the way in which the basic constitutional framework was established for three western societies: the United States, Australia, and West Germany. Like Canada, all three are today federal states although none were federal states prior to the constitutional process described below. The experiences of these countries, and in particular their experiences with mechanisms related to that of the constituent assembly, are often raised when constituent assemblies are discussed and in some ways provide useful guideposts for Canadians. Yet it must be stressed that the conditions attending the drafting of the American constitution in 1787, the Australian constitution in the 1890s, and West German constitution in 1949 do not closely parallel those found in Canada today. Unlike Canada, all three countries lacked a strong and viable national government at the time of their constitutional deliberations.

A. THE UNITED STATES OF AMERICA

During the American War of Independence a continental Congress was established to manage the general interests of the thirteen former colonies. Each state in the Congress was represented by 2 to 7 delegates although voting was by state and each state had only a single vote. Delegates were chosen and paid by the state legislatures, and were subject to recall by them. The Articles of Confederation establishing the Congress had been ratified by the state legislatures and not by the voters of the states. Amendment to the Articles required the unanimous consent of the states.

Over the nine year period between 1777 and 1786 the Articles of Confederation proved to be an unsatisfactory constitutional framework for a number of reasons. The national government could act directly on the American people only through and with the consent of the state governments; the locus of sovereignty resided in the individual states. The need for unanimous consent in the Congress paralyzed the national government. The Congress lacked effective control over finance, commerce or external affairs. There was no common currency as seven states issued their own money. Nine states had their own navies. Con-

gress found it difficult to negotiate foreign trade agreements because other countries doubted that the states would ratify such agreements. As a consequence the states competed among themselves for foreign trade.

In 1785 delegates from two states, Maryland and Virginia, met to settle a dispute over the commercial use of the Potomac River. The meeting was successful and, under the urging of George Washington, the two states agreed to call a convention of all states to consider general matters of commercial policy. Only five states met at this second convention called in 1786; even the host state, Maryland, backed out. Despite the failure of the trade convention the five states in attendance responded to the urgings of Alexander Hamilton and called for a general constitutional convention to reconsider the Articles of Confederation. The convention was scheduled for Philadelphia in the summer of 1787.

This call for a constitutional convention coincided with a general sense of discontent and was crystallized by the Shays rebellion in which Massachussetts farmers rebelled when the state government tried to enforce farm mortgage foreclosures. As a result of these events seven states appointed delegates to go to Philadelphia. Impressed with this response, the Continental Congress then issued its own call for a constitutional convention in Philadelphia. Rhode Island refused to attend, but the other twelve state legislatures appointed 74 delegates, 55 of whom arrived in Philadelphia. Many of those delegates were bound by state instructions only to amend but not replace the Articles of Confederation.

The Philadelphia delegates went beyond their mandate by writing an entirely new constitution, one that created a new national government and changed the United States from a league of sovereign states to a federal political community. Given the sweeping changes that were introduced, delegates feared that their proposal would not be ratified by the state legislatures. They thus sought ratification through the extra-legal process of directly elected state conventions. The Philadelphia delegates also abandoned the necessity of unanimous consent, and decided that approval of 9 states would be sufficient to bring the new constitution into effect.

The constitutional convention directed Congress to seek ratification of the new constitution by submitting it to "a Convention of Delegates, chosen in each state by the People thereof". Some of these state conventions were simply extensions of the state legislatures, some of whom were popularly elected. Although no single ratification procedure prevailed across the thirteen states, eventually all thirteen ratified the new constitution and thus replaced the Articles of Confederation.

The American experience is interesting in that the ratification procedures bypassed the state governments; a new federal constitution

was imposed without the consent of the constituent states even though those states were considered sovereign in their own right. Sovereignty was appropriated by the people or, more accurately, by the Philadelphia delegates acting in the name of the people. This was possible because of a growing nationalist sentiment in the United States, because of the unquestioned failure of the previous constitutional order embodied in the Articles of Confederation, and because the operations of the existing, small-scale state governments were not significantly disrupted or displaced by the new Constitution. Rather, a new national government was created alongside of the pre-existing states. These conditions have few parallels with the Canada of the 1980s.

B. AUSTRALIA

The basic constitutional instrument in Australia is the Constitution Act passed by the British Parliament in July, 1900. The Commonwealth of Australia came into existence on January 1, 1901. The Constitution Act was the result of constitutional conventions held over a six year period.

In the 1880s colonies in the general area of Australia had set up a Federal Council of Australasia empowered to legislate on matters beyond the competence of individual colonies. In 1891 delegates from the colonial legislatures met in Sydney "to consider and report upon a scheme for a federal constitution". A draft constitution was produced in less than a month, but no further steps were taken.

In 1896 the constitutional convention idea was revived. Each colony drafted enabling acts that provided for the election, by direct popular vote, of ten representatives to act as delegates to a federal constitutional convention. The convention was to draft a constitution, adjourn while the draft was considered by the various parliaments, and then reconvene to consider suggested amendments. The constitution was then to be put to a popular vote for ratification.

The new convention was held in 1897. The elected delegates produced a draft constitution in about three weeks, and constitutional debates were held in the various parliaments from May to September. Amendments were suggested but were not binding on the constitutional convention, which met again in March 1898. There the draft was adopted and sent to the electors.

All colonies except New South Wales approved the constitution with decisive majorities; in New South Wales approval was below the 80,000 statutory minimum and the constitution was therefore deemed to be rejected. The premiers got together, amended the constitutional proposal making certain concessions to New South Wales, and re-

submitted the proposal to the electors. This time it passed, and was sent to the Queen for final ratification.

The Australian experience presents an interesting mixture of legislative and popular ratification. The legislative bodies played a major role in fine-tuning the constitutional proposal and in setting the stage for its popular ratification. Final ratification, however, came from the people in a direct vote. The role of the legislative assemblies was that of intermediaries.

C. WEST GERMANY

The West German constitutional document is called The Basic Law. Adopted in May, 1949, the initiative for it came from the western allies (Anglo-American-French) after a meeting in London in 1948. The allies called for the convening of a constituent assembly to draw up a democratic federal constitution. The constitution was to be federal so that future German leaders would not have a highly centralized government at their disposal. The constitution also had to be adaptable to the eventual reunification of Germany, had to protect the rights of the participating states, and had to contain guarantees of individual rights and freedoms.

Instructions for the constituent assembly were delivered to the Ministers-President of the 11 *Lander* or States in the Western zone who had established their claim to speak for the German people. They, however, rejected the idea of a constituent assembly as they felt it would be prejudicial to the chances of reunification. Instead, and in conjunction with the military governors, it was decided that a Parliamentary Council would draft the Basic Law. The allies would have preferred to have the new constitution ratified by a national referendum, but this was not possible given Soviet objections. Thus ratification by the *Landtage* or state parliaments provided the fullest possible public participation under the circumstances.

The Parliamentary Council was composed of 65 members drawn from the political parties in the *Lander*. Each *Landtag* elected one representative for every 750,000 population with one extra for any remainder over 200,000. The political parties were represented in proportion to their strength in the *Landtage*.

The Parliamentary Council produced a draft constitution in three months. After further discussion and revision it was presented to the allies in February, 1949. Although the allies objected to certain provisions, the German proposals prevailed and the allies eventually capitulated. The final draft was accepted by all of the *Lander* except Bavaria, which objected that the constitution gave too much power to the central government. However, given that the other *Lander* had approved, the

constitution was considered ratified and came into effect on May 23, 1949.

The German situation in the late 1940s bears little resemblance to Canada today; there is no Canadian analogy to the role played by the allies or to the catastrophic political impact of the war. Nevertheless, the German experience provides a useful example of constitutional flexibility in federal states.

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The experience of other countries illustrates the great diversity of constitutional options available to Canadians. Canada is not a new state being formed as was Australia; nor is it a country completely reshaped by war as was West Germany, nor a country confronted with a completely unworkable constitutional order as was the United States. However, while the Canadian conditions do not parallel those in other countries, the process of constitution making and constitutional reform adopted elsewhere can serve as a source of ideas and insights for Canadians in the 1980s.

V. CANADIAN GUIDEPOSTS

To date, the idea of a constituent assembly has not been the subject of extensive discussion in Canada. Constitutional reform has largely remained in the hands of governments and intergovernmental negotiation; the potentiality of greater public participation has not been extensively explored. However, in the face of both continued intergovernmental failure to produce constitutional change and broadly criticized unilateral actions by the federal government, the constituent assembly alternative is beginning to receive greater attention. The following are some of the proposals that have surfaced in the past few years.

A. THE HARNEY PROPOSAL

In 1977 the former NDP Member of Parliament for Scarborough, John Harney, proposed the creation of a constituent assembly chosen and elected for the purpose of writing a new constitution, an assembly that would "include all the views and consider all the options". A constituent assembly, Harney argued, would bring the constitutional debate to the people and would thus broaden that debate.

Harney proposed that a federal-provincial conference ask parliament to issue the call for a constituent assembly. This call would set the terms of reference, the basic agenda, and the method of representation. The assembly would bring together members of parliament and the provincial legislatures as well as specially elected delegates. The latter would be elected to the assembly from special constituencies after a campaign devoted to constitutional issues. Provisions would be made for the additional representation of native and minority groups. Harney's proposal goes little beyond raising the basic idea and justification of a constituent assembly; the critical issues of representation, function and ratification are not addressed in any specific or detailed form.

B. BRETON AND SCOTT'S DESIGN OF FEDERATIONS

In a 1980 publication by the Institute for Research on Public Policy, Albert Breton and Anthony Scott also proposed the formation of a constituent assembly. Their proposal was based on elaborate economic

foundations that cannot be reproduced here, and the political vocabulary employed was rather idiosyncratic and not in keeping with conventional political usage. The basic proposal calls for the creation of a large and ongoing constituent assembly. Indeed, the assembly would not just convene to draw up a new constitution but would continue as a central institution in the Canadian political system.

The Breton/Scott proposal addresses one of the critical weaknesses of the present process of constitutional reform, and that is the exclusion of many interested parties and points of view. The basis of representation in the first ministers conference is simply too narrow. Furthermore, they argue, the governments of Canada are interested first and foremost in their electoral positions rather than in the constitutional package per se; "thus, because they are not interested in discussing the constitution with politicians, persons and parties who have no power or positions to trade, many opinions, preferences, and voices . . . are altogether ignored".

Breton and Scott argue for the establishment of a "super assembly" that would represent (the precise criteria of representation are not given) not only the national and provincial governments but also national and provincial opposition parties, local municipalities, school boards, and minority groups. Members would be elected and would seek re-election as the assembly would meet periodically on a continuing basis. It would handle any form of jurisdictional dispute no matter what the level of government involved.

The mechanics of the Breton/Scott proposal are not well defined but it is clear that the assembly would be huge, ongoing, and operating across a broad swath of Canadian politics. The assembly would not be a deliberative body; rather the members would behave as autonomous, electorally-ambitious political actors. Constitutional decisions would be made by a process similar to the free market mechanism in economic theory. The monopolistic privilege of the federal and provincial governments would be broken, and a new constitutional order would emerge from the free play and interchange of up to thousands of actors in a national constituent assembly.

The proposal is analogous to the hidden hand in economic theory. The behavior and motivations of politicians are not to be changed but instead a new institutional framework is to be created. This new constituent assembly would bring with it not only a new constitution but a radically new form of government.

C. POSITIVE ACTION COMMITTEE

In the summer of 1980 a plan for a constituent assembly was proposed by the Positive Action Committee, a group emerging from federa-

list participation in the Quebec sovereignty association referendum campaign. The plan was motivated by the belief that existing methods of constitutional reform had been immobilized by the self-interest of governments, and that too many Canadians were shut out of the constitutional process.

The Positive Action Committee's proposal tried to meet the demands of representation and political responsibility. The assembly would have 200 members, 100 from the federal parliament and 100 from the ten provincial legislative assemblies. Federal members would be selected in proportion to their party strength in the House of Commons. The provincial members would be divided among the provinces in proportion to each province's representation in the House of Commons, while the individual provincial delegations would be proportionate to party strength in the provincial legislative assemblies. No procedures for decision making, agenda setting or ratification were addressed.

D. THE BERCUSON PROPOSAL

In the fall of 1980 the Canada West Foundation commissioned a study of the constituent assembly concept by University of Calgary historian David Bercuson. In his report Bercuson proposed a wholly elected constituent assembly for which any Canadian citizen, elected politician or not, would be able to run. The assembly or constitutional convention would have an open mandate, and would determine its own rules and procedures.

Delegates would solicit the opinions of as broad a segment of the Canadian public as possible, but the negotiations of the convention would be carried out in secrecy. Only under such a condition could serious deliberation take place. Within a year the assembly would submit its recommendations to the people of Canada, providing that those recommendations enjoyed the support of a majority of the delegates and a majority of each provincial delegation.

In a national referendum the people of Canada would approve or reject the constitutional package. Approval would require something more than 50% of the national vote, and approval in each region. Final ratification, however, would come through the parliament of Canada and the provincial legislatures, for they would decide whether or not to implement the recommendations approved in the national referendum. If the governments of Canada failed to implement the constitutional recommendations they would be held accountable to their respective electorates. Whether unanimous consent from the governments of Canada would be required is not clear.

E. THE PROGRESSIVE CONSERVATIVE PROPOSAL

In September 1980 the national Progressive Conservative party recommended the formation of a constitutional convention, in part to serve as a backup to the then upcoming First Ministers constitutional conference and in part to pursue elements of constitutional reform not on the agenda of the First Ministers. The rationale for a constitutional convention was expressed as follows by the Conservative leader, Joe Clark:

> "the differences among governments are legitimate, and sometimes, deep. The challenge now is to find a forum where reasonable Canadians will be free to express those differences, understand them, and then resolve them. Conferences of First Ministers are unlikely to resolve the more important differences because, by definition, those conferences are meetings of heads of government who all have vested interests to protect. They bargain at the margins, rather than reach to the root of reform."

The Conservative party called for a constitutional convention to be mandated by parliament. However, while parliament would set the terms of reference, the convention itself would decide upon its own rules. The convention would consist of members of parliament and members of provincial legislatures, selected on the basis of proportional representation of party strengths in those bodies. There would be 50 MPs, 48 provincial representatives, and 2 territorial spokesmen. In addition, there would be ten other delegates, selected by the first 100, to represent special groups such as Native peoples.

The 48 provincial members would be drawn equally from four regions: Atlantic Canada, Quebec, Ontario, and the West. Within Atlantic Canada and the West the members would be distributed among the provinces in proportion to population, although no province would receive less than two members. Each member of the convention would have one vote.

The convention would produce its recommendations within 12 to 18 months, and these would be sent to parliament and the provincial legislatures for consideration. The precise ratification procedure, however, is left undefined in the Conservative proposal. Rather it is assumed that "... a package of responsible proposals, put forward as a consensus from a group reflecting effectively the full range of political trends in Canada, both provincially and federally, will be met at the end with general public approval". The very real problem of what would be done in the absence of such a consensus is not addressed.

VI. A WORKABLE ALTERNATIVE

The following proposal is made taking into consideration the objections which have been previously outlined. It provides a *model* of how a constituent assembly might be formed, and how it might handle questions of ratification, representation, agenda setting, and so forth. The point to stress is that it is but one of many possible models, and thus challenges to its details should not be confused with challenges to the principles embodied in the idea of a constituent assembly.

A. INITIATION

If the idea of a constituent assembly is accepted as a good one, and the advantages outweigh the disadvantages, then the next question logically becomes the matter of how a constituent assembly could be created and put into operation. Clearly, there are very real obstacles in the way of such action, the lack of Canadian precedents and the reluctance of the first ministers being cases in point.

The advantages and disadvantages of the constituent assembly both stem from the same source, namely the fact that it is an extra-constitutional mechanism. It would not exist and is not intended to exist as an ongoing body operating upon and interacting with the normal institutions of government. Rather, it would be a short-lived "one shot" affair, created to conduct hearings and to undertake deliberations resulting in a set of proposals for constitutional change that would be submitted for popular ratification. It would be a deliberative, not a legislative body, able only to suggest, not to compel. Perhaps the clearest recent analogy would be the Pepin-Robarts task force. The differences would be that the constituent assembly would be elected, not appointed, and would report to the country at large, not to a government. The most important difference is that the recommendations of a constituent assembly would be submitted for popular ratification, not permitted to vanish into political limbo.

Obviously, an extra-constitutional solution can be sought only in exceptional circumstances. The continuation of the current political deadlock, the stalemate on constitutional reform, and the continued failure of established procedures to resolve the substantive issues of constitutional change are *prima facie* exceptional circumstances. This

cul-de-sac could lie ahead of us regardless of the fate of the federal government's constitutional resolution before the Supreme Court because that proposal does not deal with either the reform of national government institutions or the distribution of powers. Neither the symbolic act of patriation, nor the ratification of a "people's package" of entrenched rights, will resolve or exorcise the very real political disputes that divide and perplex governments. Both the demands of the Quebecois and the concerns of Western and Northern Canadians go beyond the "packaging" to the "content" of the Canadian constitution, and it is on this level that they must be met.

The compelling demonstration of the repeated failure of existing methods of constitutional reform creates one precondition for the establishment of a constituent assembly. Desperate situations call for desperate measures. It could be argued that our situation does not yet parallel the failure of the Articles of Confederation in the pre-Convention United States, although it is plausible to suggest that the greater responsibility of modern governments and the greater complexity of the societies in which they operate puts the danger point much lower now.

A second "exceptional" circumstance would be a wave of popular enthusiasm for the notion of a constituent assembly as a way out of the endless indecision of constitutional stalemate. The size of the relevant public, and the way in which this popular pressure could be generated and conveyed to political leaders, are impossible to specify with any precision. However, even against the background of frustration, it would still seem necessary to force the hands of the first ministers, or for them to allow the appearance of their hands being forced.

Because of the extra-constitutional, and therefore legally ambiguous, position of the assembly, this popular enthusiasm and support would have to be sustained. It would have to last through the process of the selection of the delegates, and past the initial convening of the assembly. The proceedings of the assembly would have to continue to engage public interest, and to build wider support for the constitutional compromise as it was forged through the process of debates and public hearings. Finally, it would have to carry that support through the process of ratification.

Obviously, we can point only to possibilities, not to certainties, but the combination of governmental frustration and popular support seem to be prime ingredients. While the constituent assembly device is not to be attempted lightly, the experience of other countries gives some real, if qualified, hope. Constituent assemblies may not always work out, but when they work, they work very well.

B. BASIS OF REPRESENTATION

The best way to obtain equitable representation is to elect ten

members from each of the ten provinces, and ten members from a northern constituency combining both the Yukon and Northwest Territories.

The number of members from each province reflects two conflicting concerns. The first is to keep the total size of the constituent assembly within manageable proportions, the assumption being that the ability to deliberate and negotiate is adversely affected by size. The second concern is to ensure that provincial delegations are able to reflect the diversity of opinion and partisanship within their provinces. The larger the delegation, the more accurate this reflection can become. Ten members from each province balances these two concerns.

Equal provincial representation may appear to discriminate against the residents of the larger provinces, as indeed does representation in the Senate and in First Ministers Conferences. However, the basis of representation is more critical with respect to ratification procedures than it is with respect to the composition of the constituent assembly. If Ontario and Quebec were given a more proportionate share of the members in the constituent assembly, one of two costs would be entailed. Either the constituent assembly would have to expand in size to the point where effective deliberative negotiations would be impossible, or the delegations from the smaller provinces would have to be so reduced in size that the internal heterogeneity of provincial populations would no longer be represented. Both costs are avoided by the proposed format. Furthermore, because members of the constituent assembly would be well aware of the need for ratification across Canada, sensitivity to regional concerns would not depend upon proportionate regional representation in the constituent assembly.

The election of ten members from the north may appear to provide excessive representation for what is a very small proportion of the national population. However, it must be recognized that the northern population is very diverse, and the election of ten members would provide for the representation of native groups that are less likely to win seats in the provincial constituencies to the south.

It should be stressed again here that the specifics of representation are open to debate and modification. Dispute over the details of representation should not distract from the broader advantages offered by the constituent assembly approach to constitutional reform.

C. SELECTION PROCEDURE

Members of the constituent assembly should be directly elected by the people of Canada. If members were selected as delegates of the provincial or federal governments, or of private interest groups, the constituent assembly would not be able to serve as a deliberative body.

Rather than being autonomous actors, members would be mouthpieces for the governments or groups that appointed them. We would be left with a rebirth of intergovernmental constitutional negotiations, only carried out in a much more cumbersome and awkward arena.

The election of members of the constituent assembly would be conducted through the electoral machinery of the federal government, and would be held within 60 days. The campaign would be regulated by the Election Expenses Act.

Any Canadian citizen would be entitled to run in the election, provided that his/her nomination papers were signed by 200 eligible voters and that he/she paid a $1,000 deposit to be refunded upon receiving 3% or more of the first ballot votes. Sitting members of either the House of Commons or provincial legislatures would be free to run provided that, if elected, they would not serve in an executive position (ie. in a federal or provincial cabinet) while the constituent assembly was in session. All members elected to the constituent assembly would be expected to serve up to a maximum two year term, and would be paid from the public purse for so doing.

Diversity within the provincial delegations will be promoted through the use of province-wide constituencies and a single transferable ballot on which voters indicate a first and subsequent choices. To be elected, a candidate would have to receive a minimum *quota* of votes, that quota being determined by dividing the total number of votes cast by the number of members to be elected, plus one. If a candidate received more than the quota, his or her surplus votes, randomly drawn, would be transferred to the second choice candidates on the surplus ballots. This process would be repeated until all the surplus ballots had been distributed. If, at that time, a full slate of candidates had not been elected, the votes received by the candidate finishing last when all first ballots had been counted would be transferred to the second choice candidates on those ballots. This process would be repeated, with successive last-place candidates being sequentially eliminated until ten candidates had been elected and the 11th and 12th place candidates determined. The latter would be designated as alternates should one or more of the first ten candidates be forced to withdraw while the constituent assembly was in session.

D. ASSEMBLY FORMAT

The constituent assembly would convene within 30 days of its election, and would establish its own rules of procedure, chairman, committee structure, travel arrangements and staff support. The assembly should be based outside Ottawa so as not to be identified with the national government and, if possible, outside Ontario. Winnipeg, as the

geographical centre of the country, would be one site, or the assembly could move through a regionally-diverse set of locations.

While the assembly might choose to seek the constitutional views of the Canadian people through public hearings, the deliberations of the assembly would be carried out in private. Its recommendations would, of course, be subjected to intense public scrutiny, but such scrutiny during the assembly's deliberations would inhibit negotiation, compromise and sober reflection.

The constituent assembly should be provided with ample time to complete what will inevitably be a very complex task. At the same time, however, if the assembly convenes for too long a period it may be difficult to recruit well-qualified candidates. We would therefore suggest that the assembly convene for six months, at the end of which time its recommendations would be sent to parliament and the provincial legislatures for debate and comment. After a three month interval for this to occur, the assembly would reconvene to polish its recommendations in light of the legislative discussion and comment. The final step of ratification could then be launched within a year of the assembly's formation.

E. AGENDA

The constituent assembly should have an unrestricted mandate of constitutional reform. In practice, however, the assembly may want to establish a more limited agenda and thus restrict the range of its activities.

One possible restriction would be to limit discussion of the federal-provincial division of powers. There are a number of reasons why this might be done. First, the division of powers is very complex and affects thousands of established federal and provincial programs. If the constituent assembly were to wade into this maze and propose major or sweeping changes the result could be programmatic and administrative chaos that could seriously and adversely affect the flow of public services to Canadians. Secondly, the division of powers is critical to the programmatic and bureaucratic self-interests of both federal and provincial governments. These governments would be more likely to endorse the formation of a constituent assembly if the activities of such an assembly were constrained with respect to the division of powers. Thirdly, it is unrealistic to hope for some quick "final solution" to the federal-provincial division of powers and its attendant conflict. There will be a continual need for adjustment, fine-tuning and flexibility. Thus the constituent assembly might reasonably be restricted to establishing a *mechanism* through which the division of powers can be adjusted in the future.

Among the priorities for the assembly should be the reform of national political institutions so as to facilitate more effective territorial

representation. This could be addressed through changes in the composition and function of the Senate, Supreme Court, and federal regulatory agencies, through revisions to the procedures and organization of the House of Commons, and through revisions to the federal regulatory process.

It should be noted that if the recommendations of the constituent assembly become too sweeping, ratification is imperiled. The more items of change that are proposed, the more individuals will find something in the package to which they cannot give their assent. Maximum change is a recipe for maximum dissension, and minimizes the prospects of ratification.

F. RATIFICATION

There are a number of means of ratification that might be considered, but the logic of the constituent assembly propels us towards a method that maximizes public participation. Specifically, we propose that the recommendations of the assembly be submitted to the Canadian people in a national referendum to be held after a 30 day campaign. The ballot would be restricted to a yes/no vote on the assembly's total constitutional package. Umbrella campaign committees for the "yes" and "no" alternatives would be established in a manner analogous to the 1980 Quebec referendum campaign.

The constitutional package would be ratified if it were supported by a national majority, and by a majority of the electorate in 8 of the 11 provinces, the Yukon and Northwest Territories being counted as a single and equivalent provincial unit. If, at the time of ratification, the Canadian constitution contains an amending formula then that formula would be used.

Ratification need not require the approval of the national or provincial governments; a national referendum would make governmental ratification superfluous. However, the governments of Canada, along with the opposition parties, would have ample time to discuss and debate the initial recommendations of the assembly before the ratification stage, and the assembly would have the opportunity to respond to this discussion and debate before the ratification stage. Moreover, the governments and opposition parties could be very active participants in the ratification campaign. If governments accurately reflect the views of their electorates, the impact of governments on the ratification campaign could well be decisive.

The involvement of governments in the ratification process would be analogous to the involvement of the Quebec and national governments in the 1980 Quebec referendum campaign. There the two governments played a very major role, yet the final decision remained with the voters of Quebec.

If the constitutional package is ratified, the constituent assembly would be disbanded after having established a procedure and timetable for the implementation of the package. If the package is not ratified, the constituent assembly would reconvene to consider possible amendments. At the end of six months the amended package would be resubmitted to the Canadian people through a second national referendum. In the event of a second failure, the constituent assembly would disband and the process of constitutional change would revert back to the control of the eleven Canadian governments.

VII. CONCLUSIONS

The constituent assembly does not provide a fool-proof means of constitutional reform; such does not exist. It does, however, provide a means of extending and broadening the process of constitutional reform beyond the mechanisms that are in place today. It provides, moreover, a means by which a new Canadian constitution can be embedded within the Canadian political culture. Thus the formation of a constituent assembly merits serious discussion, and it has been to promote that discussion that this report has been prepared.

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